Office - Supreme Court U.S.
FILED
AUG 13 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 360 .

MAY SEED AND NURSERY COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

PAUL FRED AHLERS,
1012-1020 Bankers Trust Building,
Des Moines (9), Iowa,
Attorney for Petitioner

BANNISTER, CARPENTER, AHLERS & COONEY,
Of Counsel.

E. L. MENSENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Opinion Below 2
Jurisdiction 2
Question Presented for Review 2
Reasons for Granting the Writ 4
Proof of Service 10
Appendix—
Opinion of Court of Appeals for the Eighth Circuit A1

CITATIONS

American Standard Watch Co. v. *Commissioner*, (2nd Cir.) 229 F. 2d 672 6
Fendrich v. *Commissioner*, 192 F. 2d 916 5
Fendrich v. *Commissioner*, 242 F. 2d 803 ..... 5, 6
Field v. *Clark*, 143 U. S. 649 8
In re Mellia, (D. C.) 5 F. 2d 687 ..... 8, 9
Interstate Commerce Commission v. *Goodrich*, 224 U. S. 194 8
Langstaff v. *Lucas*, 9 F. 2d 691 7
Phillips Petroleum Co. v. *Commissioner*, 176 F. 2d 737 7
Teichert & Sons, Inc., v. *Commissioner*, 18 T. C. 785 5
Wiener Machinery Co., Inc., v. *Commissioner*, 16 T. C. 48 ..... 4, 5

STATUTES

Section 710 (a), (b), (c) (3) B, d, Internal Revenue Code 1939 ..... 2, 3, 4, 6, 9
Section 722 (a), Internal Revenue Code, 1939 ..... 2, 3, 4
Section 322, Internal Revenue Code, 1939 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. .....

MAY SEED AND NURSERY COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause, on the 13th day of March, 1957. Petition for Rehearing was denied by the United States Court of Appeals for the Eighth Circuit by Order entered on the 15th day of April, 1957.

OPINION BELOW.

The Opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported in the bound volumes of the Federal Reporter, but is reported in Volume 242, Federal Reporter Advance Sheets, pages 151 to 155. The Order of the United States Court of Appeals denying Petition for Rehearing is not reported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

Under the provisions of the excess profits tax law a constructive average base period net income for the fiscal years 1941 to 1946, inclusive, was agreed upon between the Commissioner and the May Seed and Nursery Company, the petitioner herein. Under this agreement, the petitioner's excess profits tax credit for the year 1941 was determined and there was an unused credit carry-over from 1941 of $18,487.12. The Respondent denied petitioner's right to use this credit in computing its tax for the fiscal year 1942 under a Treasury regulation which required the petitioner to have claimed its unused credit when petitioner filed its claim under Sec. 722* on September 15, 1943.

The first question presented is that the controlling sections of the statute, Section 710 (a), (b), (c) and (d)

---

*All references to the Revenue Code are to the *1939 Code*.

and Section 722 (a), were clear and not subject to being modified or added to by the Treasury regulation. Stated in simple terms, Section 722 (a) provides that when a taxpayer has established a constructive average base period net income, the constructive average shall be used in lieu of its actual average base income. The petitioner established a constructive average base period net income under the law and regulations and concluded the proceeding under Section 722 with the signing of the agreement with the excess profits tax counsel on April 3, 1952. No further consideration of Sec. 722 (a) need be given to determine the issue here, because the statute neither permitted nor required anything more; all that remained was to compute the tax on the adjusted excess profts tax net income as defined in Sec. 710 (b), *Definition of adjusted excess profits tax net income,* which reads as follows:

> "As used in this section, the term adjusted excess profits tax net income means the excess profits tax net income minus the sum of, one, specific exemption, two, excess profits credit, and, three, unused excess profits credit less the amount of the unused excess profits credit adjustment for the taxable year computed in accordance with subsection (c)."

Sec. 710 (c) (3) (B), *Unused Excess Profits Credit Carryover,* provides:

> "If for any taxable year beginning after December 31, 1939, the taxpayer has an unused excess profits credit, such unused excess profits credit *shall be an unused excess profits credit carryover for each* of the two succeeding taxable years, except that the carryover in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the intervening taxable year. * * *" (emphasis supplied).

There is no controversy between the parties as to the amount of the excess profits net income or the amount of the three (3) deductions to be made therefrom to arrive at the adjusted excess profits net income. The controversy is confined to one point, namely, Respondent claims that the amendment to his regulations of July 21, 1944, required the Petitioner in his claims under Sec. 722 filed on September 15, 1943, to have specifically claimed a carry-over from 1941 to 1942. The Petitioner claims that the provisions of Sec. 710 are unambiguous and mandatory and, even assuming that they were not, a 1944 amendment cannot be given retroactive effect so as to apply to its claim filed on September 15, 1943.

REASONS FOR GRANTING THE WRIT.

1. The provisions of Sec. 710 above are unambiguous and mandatory.

2. A statute, plain on its face, may not be added to, interpreted, nor affected by departmental regulation.

3. A regulation, valid or invalid, issued under Section 722 cannot affect Section 710. The opinion, succinctly stated, holds that a regulation of the Commissioner of Internal Revenue issued under Section 722 can be retroactively applied to invalidate Section 710. Such a legal error must be corrected.

4. There is a conflict in the decisions of the Seventh and Eighth Circuits, and the matter should be settled by a decision of this Court.

Of these in their order, *the provisions of Sec. 710 are unambiguous and mandatory*:

In *Wiener Machinery Co., Inc.*, v. *Commissioner*, 16 T. C. 48, it is held that in that case there was no carry-

over from one year to the next because the carry-back to the previous year had absorbed the credit. The Court said on page 52:

> "The Petitioner concedes that the Respondent in his review of its excess profits tax return for 1945, has applied properly to the years 1941, 1942, 1943 and 1944 the statutory provision set forth in Section 710 (c), as Petitioner must do because the procedure set forth for the computation and carry-back and carry-over of the unused excess profits credit adjustments *are mandatory.*" (Emphasis supplied).

In the case of *Teichert & Sons, Inc., v. Commissioner,* 18 T. C. 785, this Court again considered the provisions of Sec. 710 (b) (3), providing for the deduction of unused excess profits credit in determination of adjusted excess profits income, and held that they are mandatory and do not give an election as to the application of an available carry-back of an unused credit. On this question, the Tax Court said, on page 787:

> "We find no ambiguity or obscurity in the provisions of Sec. 710 (b) (3) or related sections material to this proceeding, which would justify resorting to extrinsic sources, such as legislative history, to determine their meaning. It is a basic rule of statutory construction that where the language is plain and admits of no more than one meaning, there is no need for extrinsic, interpretive aids. The language being plain and not leading to absurd or wholly impractical consequences, it is the sole evidence of the ultimate legislative intent."

A recent case very much in point on this subject is *H. Fendrich* v. *Commissioner,* 192 F. 2d 916, and on second appeal *H. Fendrich* v. *Commissioner,* 242 F. 2d 803. This case holds that where a question of tax due is properly before the Tax Court on the question of a proper base

period net income, it is before that Court upon other issues, including the standard issues as well, for determination of the amount due. Reference is made in the second opinion to Sec. 322, as follows:

> "Sec. 322, *Refunds and Credits*—b. *Limitation on allowance* (1) *Period of Limitation.* Unless the claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer, or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever periods expires the later."

It was held by the Tax Court that this section barred consideration of amounts which were paid in previous years. The Court refers to the case of *American Standard Watch Co., Inc.*, v. *Commissioner*, 2nd Cir., 229 F. 2d 672, in which the taxpayer filed claim for relief under Sec. 722 and it was held that while the matter was pending before the Commissioner, who had it under advisement, the right to collect the claims expired. Petitions were then filed with the Tax Court. The Commissioner contended that the corporation which filed the claims no longer existed when it filed its petition with the Tax Court, therefore, the petition should be dismissed. The Tax Court agreed but the Court of Appeals reversed, saying:

> "The obvious purpose of the remedial or equitable provision of the Code would be frustrated by an interpretation which would thus separate the filing of refund claim from the filing of the Tax Court petition. We regard them both as but parts of the same proceeding which began when admittedly each of these corporations still lived."

In the case at bar the Petitioner claims that the Internal Revenue Code, Sec. 710, is plain on its face; that it provides

for credit for an unused excess profits carryover to the first and second succeeding years and that it is mandatory and may not be affected by a regulation, for the reason that a statute which is plain on its face may not be added to, interpreted nor in any other way limited by a departmental regulation.

In *Phillips Petroleum Company* v. *Commissioner*, 176 F. 2d 737, the Circuit Court of Appeals for the Tenth Circuit, held that it was bound by the decision of the case of *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, and added:

> "It is said that where the administrative agency is possessed of continuing rule-making power, as is the Commissioner of Internal Revenue, the Court should not hamstring it by prohibiting future changes *prospective* in nature." (Emphasis supplied).

In *Langstaff* v. *Lucas*, 9 F. 2d 691, affirmed by the Sixth Circuit Court of Appeals, 13 F. 2d 1022, it was held the language of the statute was plain and unambiguous and could not be modified nor affected by departmental rule. In that case the taxpayer had relied upon Article 1566 of Regulation 45, 1919 Edition, which held that distribution in kind by a corporation on dissolution to its stockholders was not taxable. The Court held that the clear provisions of the law taxing gains from liquidation made this distribution taxable and that the provisions of the law must prevail over the regulations. The Court said:

> "In dealing with regulations relied upon by the plaintiff, it must be borne in mind that the Treasury Department was not, and could not be authorized by the Revenue Act of 1918 * * * under which the tax here involved was collected, to impose income taxes nor to exempt from income taxation. That power is vested in Congress and was exercised by that body in the Act of 1918. The only power given to the Treas-

ury Department by that Act in respect to regulations, was to make all necessary regulations for carrying out the provisions of the Act. Therefore, it necessarily follows that any regulations of the Treasury Department which would exempt from taxation income which the statute specifically taxes, would be void."

In *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U. S. 194, The United States Supreme Court held that Congress may not delegate its purely legislative powers, saying on page 214:

> "The Congress may not delegate its purely legislative power to a Commission but, having laid down the general rules of action under which the Commission shall proceed, it may require of that Commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

In *Field* v. *Clark*, 143 U. S. 649, l. c. 693, and 694, the Court said:

> "The true distinction, as Judge Renny, speaking for the Supreme Court of Ohio, (*C. W. & Z. R. R. Co.* v. *Com.*, 1 Ohio St. 77, 88) has well said, is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In the case of *In re Mellia*, (D. C.) 5 F. 2d 687, 689, the Court said:

> "Did the making of the departmental regulation here in question come within the power conferred by the last statutory provision? It is settled law that while any executive tribunal or official may constitutionally be empowered by Congress to make such regulations as are reasonably necessary to the proper execution of the statute, so long as such regulations are made administrative in character and relate only to the enforcement of the statute, that such an executive tribunal or executive cannot, constitutionally, either with or without the sanction of Congress, make any rule or regulation, the effect of which would be to add to, take from, or otherwise change the statute, for that would be to permit the executive department to encroach upon and usurp the function of the legislative department to which alone belongs the power to legislate."

The law as laid down in these decisions and applicable to the case at bar, is that under the plain provisions of Section 710 (c) (3) B, the petitioner was entitled to credit for the unused excess profits carry-over from 1941 to 1942, and the regulation promulgated in 1944, forbidding this to be done, is not valid.

A consideration of the facts and the law applicable thereto in this case, leads undoubtedly to the conclusion that there was no room for the operation of a departmental regulation eliminating the application of the unused excess profits tax credit from 1941 to 1942.

Furthermore, that the holding of the Court of Appeals for the Seventh Circuit that once the case is properly lodged in the Tax Court, on whatever ground, that Court has a right and duty to determine the amount

of the tax or refund arising from that or any other source, is sound and should be adhered to.

To correct the error above pointed out, we respectfully ask that this Court grant the Writ asked for so that justice may be done in this case.

Respectfully submitted,

PAUL FRED AHLERS,
Attorney for Petitioner.

BANNISTER, CARPENTER, AHLERS & COONEY,
Of Counsel.

PROOF OF SERVICE.

I, ..., a member of the Bar of the Supreme Court of the United States, and attorney for the Commissioner of Internal Revenue, Respondent, hereby accept service and acknowledge receipt of two copies of the foregoing Petition to the United States Supreme Court for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit this ..... day of ....., 1957.

.....
Attorney for Respondent.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 15,518.

May Seed and Nursery Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent.	Petition to Review Decision of The Tax Court of the United States.

[March 13, 1957.]

Robert J. Bannister (James E. Cooney, E. B. Carpenter and Bannister, Carpenter, Ahlers & Cooney with him on the brief), for Petitioner.

Harry Marselli, Attorney, Department of Justice (Charles K. Rice, Assistant Attorney General, and Lee A. Jackson, Attorney, Department of Justice, with him on the brief), for Respondent.

Before SANBORN, JOHNSEN and WHITTAKER, Circuit Judges.

JOHNSEN, Circuit Judge.

The Commissioner of Internal Revenue refused to allow May Seed & Nursery Company, of Shenandoah, Iowa, to have the benefit, under 26 U. S. C. A., Int. Rev. Code of 1939, § 710, for its fiscal year 1942, of an unused excess profits tax credit carry-over, from its fiscal year 1941,

based on a constructive average base period net income established in 1952 between the parties under § 722 of the Code. The result was a determination of deficiency against the taxpayer for the year 1942.

The ground of the Commissioner's refusal was that no claim for the benefit of such credit carry-over had been made in the application (or any amendment thereto) filed by the taxpayer for relief under § 722, to have a constructive average base period net income established and used in relation to its 1942 tax liability.

Treasury Regulations 109, Sec. 30.722-5, as amended July 21, 1944, contained certain procedural prescriptions, among which were the following: (a) * * * "If an unused excess profits credit for any taxable year for which an application for relief on the appropriate Form 991 has not been filed, computed on the basis of a constructive average base period net income, is to be used as an excess profits credit carry-over or carry-back, the taxpayer must file an application on Form 991 * * * for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied. The application in such case must be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied [which period under § 322 is in general 3 years from the date the taxpayer has filed his return or 2 years from the date he has paid the tax, whichever expires later]. In addition to all other information required, *such application shall * * * claim the benefit of the unused excess profits credit carry-over or carry-back.* If an application on the appropriate Form 991 for the benefits of section 722 has been filed with respect to a taxable year, or if the filing of such application is unnecessary under

(d) of this section, and if the excess profits credit based upon a constructive average base period net income determined for such taxable year produces an unused excess profits credit for such year, to obtain the benefits of such excess profits credit as an unused excess profits credit carry-over or carry-back *the taxpayer should file an application upon Form 991 * * * or an amendment to such application if already filed, for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied.* Such application or amendment should be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied. * * * (e) The taxpayer shall file an application for relief under section 722 for each taxable year for which such relief is claimed, regardless of whether a constructive average base period net income has been determined with respect to such taxpayer for a prior taxable year. * * *" (Emphasis supplied).

The Tax Court upheld the Commissioner's refusal and denied the petitioner relief, for the reason, as stated, that it had failed to claim the benefit of any possible credit carry-over, which might exist from its fiscal year 1941, in the application filed by it, or amendment made thereto, for relief under § 722 as to its fiscal year 1942. The Tax Court followed its previous similar holdings, in *Lockhart Creamery* v. *Commissioner*, 17 T. C. 1123, 1140-1143; *Barry-Wehmiller Machinery Co.* v. *Commissioner*, 20 T. C. 705; and *St. Louis Amusement Co.* v. *Commissioner*, 22 T. C. 522.

In the *Lockhart Creamery* case, the opinion had said: "Congress did not attempt in enacting section 722 to enumerate the requirements in connection with the taxpayer's application for relief, but the statute did authorize

the Commissioner with the approval of the Secretary of the Treasury to do so. In compliance with the Code provision, the requirements of an application for relief were set forth in [the Regulations referred to above in our own opinion]. * * * The computation of an unused excess profits credit * * * is by its own nature quite complicated and particularly is this so when the credit is to be increased by reason of section 722 relief. We are persuaded that for administrative reasons the formal and detailed requirements which here deny petitioner any excess profits credit carry-over based on section 722 relief for the years 1940 and 1941, were correctly prescribed by the Commissioner." 17 T. C. at p. 1142.

Stated more concretely in relation to the case that is before us, there would not seem to be any general unreasonableness in an administrative requirement by the Commissioner that, in the complexities involved in his dealing with an application for section 722 relief as to a particular year and a determining of the amount of taxes due for the year on the basis of any such granted relief, his notice should be specifically challenged to the fact that a carry-over or carry-back credit is to be taken into account by him, through the assertion of a claim for the benefit of such carry-over or carry-back credit in the application which the taxpayer has filed for an amendment made thereto.

Petitioner contends, however that the requirement of the Regulations for such a claiming of benefit of unused excess profits credit is in conflict with § 710 (c) (3) (B) of the Code, as amended, and that the requirement therefore is invalid. It argues that § 710 grants and makes mandatory an automatic allowing of use of any excess profits credit carry-over, without the need to make any

claim for the benefit. The provision relied on reads: "If for any taxable year beginning after December 31, 1939, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the intervening taxable year * * *."

The brief of petitioner quotes the statement of the Tax Court in *Wiener Machinery Co., Inc.*, v. *Commissioner*, 16 T. C. 48, 52, that "the procedures set forth [in § 710 (c)] for the computation and carry-back and carry-over of the unused excess profits credit adjustments are mandatory." But that case did not involve the matter of relief under any of the abnormality provisions of the Code, such as § 722, and the Tax Court has not accorded it any significance or relationship in its holdings in the *Lockhart Creamery*, *Barry-Wehmiller Machinery Co.*, and *St. Louis Amusement Co.* cases, *supra*, on the validity of the requirement of the Regulations for claiming the benefit of any unused excess profits credit as a carry-over or carry-back, to which the taxpayer may be entitled, in such applications as may be filed for relief under § 722 (a) to have a constructive average base period net income established.

Whatever automaticness of right there may exist under § 710 to have an unused excess profits credit taken into account is entitled to be treated, we think, as the Tax Court has done, as being at most related to adjustments arising under regular tax returns and not to determinations necessary to be made of the amount of taxes due as

a result of relief granted a taxpayer on its special application under § 722 (a) for the establishment of a constructive average base period net income as to its excess profits.

It is to be noted that the obtaining of relief under § 722 is a matter which a taxpayer ordinarily is entitled to have considered only after it has filed its return in regular course and has paid the taxes due on the basis thereof. Subsection (d) of § 722 expressly provides that "The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5)." And it is further provided that "The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section *makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.*" (Emphasis supplied).

Under the plenary power given the Commissioner to prescribe regulations as to the making of application by a taxpayer for special relief under § 722 (a), we can see no violation of the language or spirit of § 710 (c), in the requirement which the Commissioner has imposed, for administrative facilitation in the complex field involved, that any unused excess profits credit carry-over or carry-back, of which the taxpayer desires to have the benefit for purposes of its tax liability, must be claimed in the application filed for the special statutory relief, if the Commissioner is to be expected or compelled to take cognizance of it.

Petitioner makes the further contention that the provision of Sec. 30.722-5, of Regulations 109, requiring such a claim to be made in a taxpayer's application for relief under § 722 (a), was not promulgated until after the application under § 722 (a) that is here involved had been filed, and that it therefore could not properly be made applicable to it. But the regulation provided for a right to make amendment of any application which had been previously filed and by this means to claim the benefit of such a credit carry-over or carry-back. And even within the limitation under § 322 governing the right to file an application itself, there still remained, at the time the regulation was adopted, more than a year until the period of three years from the filing of petitioner's regular tax return would expire. Thus, it would not be possible abstractly to contend that the Regulations had, in their operation against petitioner's situation, not afforded it a fair opportunity for compliance.

Moreover, if the situation were one in which § 322 (b) (1) had been satisfied otherwise, the Commissioner could, for reasons which he might deem sufficient, have allowed the application under § 722 (a) to be amended, to make claim for the benefit of any unused excess profits credit for 1941, upon request on the part of the taxpayer to him, at any time up to the final disposition of the application, which occurred in 1952. Cf. *Angelus Milling Co.* v. *Commissioner*, 325 U. S. 293, 297, 65 S. Ct. 1162, 89 L. Ed. 1619; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619. But petitioner made no such request, and after its application under § 722 (a) had been disposed of and the Commissioner had engaged in making determination of its tax liability on the basis thereof, it was not in a position to demand that waiver then be made of the requirement of the regulation. What the Tax

Court said in the *Barry-Wehmiller Machinery Co.* case, *supra*, 20 T. C. at p. 714, is applicable here: "This is not a case where respondent [can be held to have] waived the strict compliance with the regulations. He insists upon full compliance, which he may do."

It may be added that tax regulations are, of course, not invalid merely because they are made to have a retroactive application. Other elements or effects must be shown than this alone, before such regulations can be held to be legally unreasonable. Congress has left the Secretary of the Treasury and the Commissioner free to impose such a retroactive effect generally, by the provision of 26 U. S. C. A., Int. Rev. Code of 1939, § 3791 (b), that "The Secretary, or the Commissioner with approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect." Retroactivity, therefore, is not a sufficient objection to a tax regulation, which otherwise is without invalidity in its application to a taxpayer's situation.

The Commissioner has made, but not pressed, a suggestion that it may be doubtful whether jurisdiction exists to engage in a review of the Tax Court's decision in the situation. 26 U. S. C. A., Int. Rev. Code of 1939, § 732 (c) provides that "If in the determination of the tax liability under this subchapter [Excess Profits Tax] the determination of any question is necessary solely by reason of * * * section 722 [or section 721 and parts of section 711 (b) (1), which are not here involved] the determination of such question shall not be reviewed or redetermined by any court or agency except (the Tax Court)."

But the questions raised by petitioner here go to (1) whether § 710 is controlling of the situation as against the

Treasury Regulations, and (2) whether the Regulations themselves are otherwise valid or applicable in the circumstances of petitioner's situation. We do not think it legally can be contended that these are determinations necessary solely by reason of § 722 of the Code.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.